IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5047 of 2004
with
SPECIAL CIVIL APPLICATION No 5048 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE D.A.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

PRIME POLYCHEM

Versus

DEPUTY DIRECTOR

Appearance:
1. Special Civil Application No. 5047, 5048 of 2004
MR UDAY JOSHI for M/S TRIVEDI & GUPTA for Petitioner No. 1
MS PJ DAVAWALA for Respondent No. 1
NOTICE SERVED BY DS for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE D.A.MEHTA

Date of decision: 11/08/2004

COMMON ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE M.S.SHAH)

Rule. Ms PJ Davawala, learned Additional Standing Counsel for Central Government waives service of Rule for respondent No.1. Since in these petitions, no relief is claimed against respondent No.2- State Bank of Saurashtra, the petitions are taken up for final disposal today without issuing any notice of rule to respondent No.2.

2. These petitions are filed by two separate petitioners challenging the common order dated 3.11.2003 and the subsequent common order dated 10.3.2004 passed by the Appellate Tribunal for Foreign Exchange, New Delhi in Appeal Nos.347 and 348 of 2003 by which the petitioners are required to make a pre-deposit of 40% of the amounts of penalties.

3. Varsha Polychem had effected foreign exchange remittances totalling equivalent to Indian Rs.60,83,652/through State Bank of Saurashtra, Mumbai. The other petitioner, i.e. the Prime Polychem had effected foreign exchange remittances totalling equivalent to Rs.30,29,924/- through the same bank. The above remittances were made between December 1996 and May 1997. The respondent-authority issued show cause notices on 30.5.2002 as to why adjudication proceedings as contemplated under Section 51 of the Foreign Exchange Regulation Act, 1973 and Section 49 of Foreign Exchange Management Act, 1999 should not be held against the petitioners for not submitting the original exchange control copies of bills of entries to their bankers to show that the goods against the said remittances were actually imported into India. The petitioners appeared before the authority and prayed for time for producing the documents. However, after availing of the opportunity, the petitioners could produce certain documents in support of their claim that the goods were imported against the remittances but the documents were not such as were required by the Deputy Director of Enforcement and, therefore, penalty of Rs.12 lakhs was imposed on the proprietor of Varsha Polychem and penalty of Rs.6,20,000/- was imposed on the proprietor of Prime Polychem by the order dated 13.3.2003.

4. The petitioners challenged the said orders in appeal. By order dated 3.11.2003 (Annexure "G"), the Appellate Tribunal for Foreign Exchange, New Delhi passed an order for pre-deposit of 40% of the amount of penalty imposed on the respective petitioners. Thereafter, the petitioners filed application on or about 28.1.2004 for modification of the aforesaid order on the ground that

the petitioners had already produced the necessary documents before respondent No.2- bank and that the petitioners may be permitted to produce the certified true copies of the bills of entry which were sufficient to support the petitioners' case that the goods were imported against the foreign exchange remittances under consideration. The Tribunal, however, rejected the said application by the impugned order dated 10.3.2004 (Annexure "J") only on the ground that the applications for modification of the order of pre-deposit are not maintainable in terms of the following observations:-

> "This application for modification is filed on the reasons that certain other steps were taken by the appellants whereafter the contravention does not subsist. May it be so, the order dated 3.11.2003 cannot be re-heard. In case the appellants feel that an error has been there, then they may take any recourse available to them in law. The application for modification of the orders is not maintainable, so it is not taken on record and is rejected."

The petitioners have, therefore, moved this Court under Article 226 of the Constitution.

5. Mr Uday Joshi, learned counsel for the petitioners submits that when the penalty is imposed only on the ground that the petitioners had not produced evidence to show that goods were imported against the foreign exchange remittances made in the year 1996-97 and such show-cause notices were issued in May 2002, the petitioners would naturally need some time to obtain the evidence. When such evidence was available, the petitioners moved the Appellate Tribunal and appeal being only continuation of the original proceedings, the Tribunal ought to have permitted the production of such documents and ought to have taken the same into consideration for modification of the pre-deposit order.

6. On the other hand, Ms Davawala, learned Addl. Standing Counsel for the Central Government submits that enough time was given to the petitioners by the adjudicating authority and the petitioners had not produced the documents in question even at the time of hearing of the said application and, therefore, the order was passed by the Tribunal on 3.11.2003 requiring the petitioners to make a pre-deposit of only 40% of the amounts of penalty involved and, hence no further indulgence is required to be granted.

7. Having heard the learned counsel for the parties, we are of the view that when the penalties were imposed only for non-production of the documents evidencing import of goods against foreign exchange remittances in the year 1996-97 after issuing show cause notice after a lapse of five years and the petitioners have moved the Tribunal for producing such evidence and the appeal being continuation of the original proceedings, the Tribunal ought to have permitted the petitioners to produce such evidence and to re-hear the stay applications.

8. In view of the above discussion, the petitions are allowed and the impugned orders dated 3.11.2003 (Annexure "G") and 10.3.2004 (Annexure "J") are quashed and set aside and the Appellate Tribunal shall permit the petitioners to produce the documents in support of their claim that goods were imported at the relevant time against the concerned foreign exchange remittances made at the relevant time and shall re-hear the stay applications on that basis.

9. Rule is made absolute accordingly.

But since the petitioners did not produce the documents evidencing the import of goods at the first hearing of the stay applications, each petitioner shall pay the respondent-authorities in one set a sum of Rs.2500/- as costs of the present petitions.

(M.S. SHAH, J.)

(D.A. MEHTA, J.)

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